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No. 08-1129

IN THE

Supreme Court of the United States

MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK and CORTLAND PINNICK, minors, and JAMES BRADY, Administrator of the Estate of MELISSA PINNICK, Deceased,

Petitioners,

v.

CORBOY & DEMETRIO P.C., a Professional Corporation, ROBERT J. BINGLE, Individually and as an agent of Corboy & Demetrio P.C., and G. GRANT DIXON, III, Individually and as an agent of Corboy & Demetrio P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This petition involves the denial of a motion to recuse four (of seven) State Supreme Court justices from considering a petition for leave to appeal from an adverse appellate court decision. The motion lacked factual support, failed to demonstrate any actual bias, and its claim of an appearance of bias was based upon non-extraordinary contributions made by certain partners at the respondent law firm to those justices' campaign committees many years before the case was presented to that Court. Under those circumstances, is there no due process violation in the denial of the motion to recuse?

RULE 29.6 STATEMENT

Corboy & Demetrio P.C. is a private, Illinois professional corporation. All other respondents are individuals.

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Respondents, pursuant to this Court's April 28, 2009 Order, respectfully submit this brief in opposition to Petitioners' Petition for a Writ of Certiorari to review the order of the Illinois Supreme Court denying recusal of certain judges.

Petitioners (plaintiffs below) lost an appeal from a legal malpractice case against these respondents-defendants. Plaintiffs sought the Illinois Supreme Court's discretionary review by filing a petition for leave to appeal from the Appellate Court's unpublished order. Concurrently with that petition, they filed a motion to recuse four of the seven sitting Supreme Court Justices. Relying on contributions made by certain partners of the respondent law firm of $250 to, at most, $11,500 (and the vast majority ranging from $250 to $2,500) to those judges' campaign committees years (some nearly a decade) before the petition was filed, plaintiffs contended that the appearance of bias required recusal. The motion to recuse was denied and this Petition followed.

OPINIONS BELOW

Petitioners are not directly challenging the merits of the underlying judgment or the Illinois Appellate Court decision in this petition. Instead, petitioners are challenging the Illinois Supreme Court's December 22, 2008 order denying recusal of four justices. That order also dismissed, as moot, petitioners' motion to find limitations of appointment of temporary justices to the Illinois Supreme Court unconstitutional.

STATEMENT OF THE CASE AND MISSTATEMENT OF FACT OR LAW IN PETITION

Much of the factual recitation in the Petition is devoted to "facts" regarding the merits of the legal malpractice suit against respondents. While respondents take issue with many of these "facts," the merits of the underlying case are not at issue in this Petition. The only legal issue at stake pertains to the denial of recusal of four Justices of the Illinois Supreme Court based upon campaign contributions or other claims of bias. Accordingly, because many of the misstatements do not "bear[] on what issues properly would be before the Court if certiorari were granted" (Supreme Court Rule 15.2), respondents have not undertaken to correct every specific misstatement of fact or law.

Background Information

In 2003, Plaintiffs filed suit against these defendants arising out of the defendants' representation of the plaintiffs in an underlying automobile negligence action against James Dinsmore. Plaintiffs obtained a judgment on one of five counts in the Complaint. Although plaintiffs had secured a judgment, they appealed from adverse rulings, including the dismissal of or summary judgment on the other counts of the complaint and a ruling limiting their recovery to $100,000.

On June 30, 2008, the Appellate Court issued an unpublished order, which affirmed the trial court judgment. Under Illinois Supreme Court Rule 23,

published opinions are limited to cases where either "(1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." Ill. Supreme Court Rule 23(a). Decisions not satisfying those criteria are issued as unpublished orders. An unpublished order is not precedential and may not be cited by other parties in Illinois courts. Ill. Supreme Court Rule 23(e).

Plaintiffs sought rehearing of that decision or, alternatively, a certificate of importance allowing them to appeal to the Illinois Supreme Court. The Appellate Court denied plaintiffs' requested relief but issued a modified decision on October 20, 2008.

Plaintiffs filed a petition for leave to appeal to the Illinois Supreme Court on November 24, 2008. In Illinois, the Supreme Court has jurisdiction to allow discretionary appeals to its court in cases like this. *See* Ill. Const. of 1970, Art. 6, § 4; Illinois Supreme Court Rule 315. The petition is submitted to the court who must decide by a quorum (four justices) to grant leave to appeal. If review is granted, then the case is briefed and the court decides the case on the merits. Leave to appeal is granted in only a small percentage of the civil appeals for which leave to appeal is sought.[1]

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[1] According to the 2007 Caseload and Statistical Records available on the Illinois Supreme Court website, from 2003 through 2007 a total of 3,189 petitions for leave to appeal and/or appeal as a matter of right were filed and a total of 248 were allowed, which is 7.7%.

When plaintiffs filed their petition for leave to appeal, they also filed a motion to recuse four of the seven presiding Supreme Court Justices from considering the petition. (Appendix to Petition for Writ of Certiorari ["App."] 3a). The motion attached a six-paragraph affidavit of plaintiffs' counsel but no other documents or evidence. The motion asserted that these four justices should be recused because of contributions made to each of these justices' campaign committees by Corboy & Demetrio partners Robert Bingle, Philip Corboy, Philip Corboy, Jr., Michael Demetrio and Thomas Demetrio.[2] The motion further asserted that there was a close relationship between Phillip Corboy and several Justices due to Mr. Corboy's role as special counsel to the Illinois Democratic Party.[3] The motion also asserted that bias might be based on certain contributions by attorneys Joseph Power and Robert Clifford. Power and Clifford are Illinois attorneys who had been deposed as expert witnesses for the defendants during the malpractice suit below. The motion also asserted that Joseph Power had acted as counsel for Justice Thomas in a recent suit.

The Appellate Court decision, which plaintiffs were seeking leave to appeal, did not mention either Clifford or Power by name. The petition for leave to appeal also did not name Robert Clifford or Joseph Power. These

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[2] These are the attorneys that plaintiffs noted they were basing their motion on so we have limited our analysis herein to these attorneys as well.

[3] In reality, Corboy's position as counsel ended years ago. He was general counsel to the Illinois Democratic Party from April, 1990 to November, 1994.

experts' opinions, discovered below, did not form the basis of the circuit court's rulings for defendants or the Appellate Court's affirmance. Except for the fact that plaintiffs raised these names within the motion to recuse, the text of the documents submitted would not have alerted the Justices considering the petition for leave to appeal that either Mr. Clifford or Mr. Power had been involved in the case below.

Facts Regarding Contributions

As to the facts regarding the campaign contributions, as set forth below, respondents contend that the plaintiffs' motion to recuse was deficient by failing to set forth sufficient or clear facts as to what they were basing their motion on. The affidavit attached to the motion stated that the facts were obtained from the Illinois State Board of Elections ("ISBE") website.[4] The respondents have reviewed the ISBE website and the semiannual and final reports that would have been available on that website through November 2008 (when the motion to recuse was filed). The amounts that we glean match the numbers suggested by plaintiffs and the facts are summarized here. We found 30 contributions (by the partners identified by plaintiffs) ranging from $250 to one $10,000 donation and one $11,500 donation. 23 of the 30 contributions ranged from $250 to $2,500. Except for Justice Burke, each of the elections for which contributions were made took place in 2000, long before the 2003 suit was filed or the case

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[4] The website can be found at http://www.elections.state.il.us or http://www.elections.il.gov.

worked its way up to the Illinois Supreme Court in 2008. Burke's uncontested election took place in 2008.

Further details regarding the contributions to each of the Justices at issue are listed below. None of these Justices acted as either a campaign chairman or a treasurer for his or her committee. Indeed, Illinois Supreme Court Rule 67 (B)(2) provides that "a (judicial) candidate shall not personally solicit or accept campaign contributions."

Justice Fitzgerald

From a period of January 1, 1999 through December 31, 2000, the Citizens Committee to Elect Thomas R. Fitzgerald received contributions of $890,840. Of that amount during that time, the site shows that the relevant Corboy & Demetrio partners contributed a total of $52,750 or about 5.9%. The site shows that petitioners' counsel, Boyle, contributed $650 to Fitzgerald during the same period.

Justice Freeman

In 1990 Freeman was elected to the Illinois Supreme Court. The contributions in 1999 and 2000 were related to his 2000 retention contest. The website reports contributions made from July 1, 1999 to December 31, 2000 to Freeman's campaign committee of a total of $216,575 but only the 7/1/100-to-12/31/00 semiannual report itemizes contributions. It shows that of the $154,650 in individual contributions during that time frame, a total of $5,000 (or about 3%) came from the partners plaintiffs identified at the defendant firm.

Justice Thomas

Thomas was elected in 2000. From July 1, 1999 to December 31, 2000, Thomas received $566,470 with $16,000 or about 2.8% being contributed by the identified partners of the defendant firm. Plaintiffs' counsel, Boyle, contributed $250 to Thomas during this time.

Justice Burke

Burke was appointed to the Supreme Court in 2006 and ran for election in 2008. From January 1, 2007 to December 31, 2007, she received $1,601,320 from hundreds of contributors. Plaintiffs state that contributions by the defendant firm s partners totaled $1,500. That is less than one percent. Burke's election was uncontested and many of the contributions were ultimately returned to the contributors.

Plaintiffs also include information regarding contributions (totaling $24,000) made to Justice Burke's husband, Alderman Edward Burke. Plaintiffs do not suggest that any of the monies contributed to Edward Burke were somehow used for Justice Anne Burke's campaign.

General Information Regarding Contributions

Except for Justice Burke, the contributions at issue took place in 1999 and 2000. (For Justice Burke, the contributions took place in 2007 but amount to less than 1% of her contributions.) The Pinnick lawsuit was filed in the circuit court in 2003 – three years after most of

these contributions were made. It was appealed in 2007 – almost eight years after most of these contributions. The petition for leave to appeal was filed in November 2008 – nearly a decade after many of the contributions.

Illinois Law Regarding Election of Judges

Like 38 other states which provide for election of some or all judges,[5] in Illinois, State Supreme Court Justices may be elected and individuals may contribute to their political campaigns. Indeed, the Illinois constitution has allowed for public election of judges for over 150 years. *See* Ill. Const. of 1848, art. V, § 3; Ill. Const. of 1870, Art. VI, § 10.

ARGUMENT AND REASONS FOR DENYING THE PETITION

The petition should be denied because it seeks review of an order denying a procedurally flawed motion, which was properly denied on its face; it presents legal issues that are not unsettled or in conflict with any other decision; and it involves an order that was properly denied on substantive grounds. Pursuant to United States Supreme Court Rule 10, a petition for writ of certiorari "will be granted only for compelling reasons."

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[5] According to an *amicus curiae* brief filed by the Conference of Chief Justices in *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, currently 39 states allow for election of judges. 2009 WL 45973, *11 (U.S.). And, "all but a handful of States hold popular elections to choose at least *some* judges to *some* benches at *some* stage of a judge's career." 2009 WL 45973, *5 (U.S.). The same brief states that, nationwide, 60% of all appellate judges face a contestable election. *Id.* at *6, n.11.

The character of reasons that this Court considers include whether a state court has decided an important federal question "in a way that conflicts with" another state high court or federal appellate court opinion or whether a state court "has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." *Id.* This case does not meet any of these criteria. It is not compelling. It presents no reason justifying use of this Court's resources.

A. The Order on Review Properly Denied a Motion Which Was Procedurally Flawed and Substantively Inadequate; Thus, There is No Compelling Reason to Consider Discretionary Review of That Order

Petitioners sought discretionary review in the Illinois Supreme Court of an Illinois Appellate Court order affirming the judgment from which they sought review. On November 24, 2008, petitioners filed a motion for recusal of four of the seven Illinois Supreme Court Justices pursuant to Illinois Supreme Court Rule 63(C) and for appointment of temporary Justices for those who recused themselves. (App. 3). As a review of that motion shows, the motion was inadequate, on its face, because it was comprised of primarily conjecture and surmise with virtually no facts or evidence to support the petitioners' contentions. As to those facts that were included within the motion, it lacked evidentiary or documentary support. Even if the facts recited were considered, they were inadequate on their face to merit the relief sought. Accordingly, the motion had to be and was properly denied and there is no basis to seek review of it.

1. The Motion at Issue Was Procedurally Flawed

Procedurally, Illinois Supreme Court Rule 361 governs "Motions in Reviewing Court." It provides that, where a record has not been filed, a movant must file with the motion an appropriate supporting record pursuant to Rule 328. Petitioners' motion lacked a supporting record or sufficient documentary support. Instead, the motion simply made statements, apparently based upon counsel's personal beliefs, with no support. The only attachment to the motion was the six-paragraph affidavit of plaintiffs' counsel which, other than background, stated only the following:

> 4. The facts contained in *Plaintiffs-Petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C)* and *Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional* regarding campaign contributions made to Supreme Court Justices or their spouses were obtained from the Illinois State Board of Elections website at http://www.elections.il.gov.
>
> 5. Specific dollar amounts of contributions listed in Plaintiffs' Motion were obtained for each Justice from the Justices or Justices' spouses D-2 campaign disclosures available on the Illinois State Board of Election website.

> 6. I affirm that all facts contained within *Plaintiffs-Petitioners' Motion for Recusal of Supreme Court Justices Pursuant to Supreme Court Rule 63(C)* and *Motion to Find Limitations of Appointment of Temporary Justices to the Illinois Supreme Court Unconstitutional* are true and correct to the best of my knowledge.

Regarding the campaign contributions, petitioners' counsel stated only that he obtained the information from the ISBE website and the D-2 campaign disclosures available on the site. Plaintiffs' counsel did not state, however, the specific dates he was using, did not attach the actual D-2 disclosures and did not attach any documentation from the website. We are left to examine the website ourselves and guess at whether we are using the same specific information. For other "facts," there is no support whatsoever. For example, petitioners claimed, without any evidentiary support, that the defendants had made "frequent invitations to Justices to participate in social gatherings. . . ." (App. 5a). Petitioners' only "support" for that statement is a footnote in the motion which states that "Mr. Corboy, as special counsel to the Illinois Democratic Party, has for years hosted parties to which several members of the Illinois Supreme Court are frequent invitees." (App.12a). There is no support provided for that footnote (and, as shown in note 3, *supra*, Mr. Corboy has not been special counsel for 15 years).

Neither the court nor the opposing party should be left to rule on or respond to a motion which is utterly

lacking in documentation, proof or context. On its face, the motion failed to meet the minimum prerequisites for consideration as a valid motion.

2. The Motion Was Substantively Without Merit

Even assuming the accuracy of the "facts" recited in petitioners' motion, they did not support a finding for recusal. Petitioners filed their motion "[p]ursuant to Supreme Court Rule 63(C)" (App.4a), but they failed to present facts or argument supporting a finding of partiality under that rule. Rule 63(C) is Canon 3, entitled "A Judge Should Perform the Duties of Judicial Office Impartially and Diligently." Section C, governing disqualification, provides in pertinent part as follows:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts . . .;
>
> (b) the judge served as a lawyer in the matter . . .;

(c) the judge was . . . associated in the private practice of law with any law firm . . . currently representing any party . . .;

(d) the judge knows that he or she . . . or the judge's spouse . . . has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimus interest that could be substantially affected by the proceeding; or

(e) the judge or the judge's spouse . . . :

(i) is a party to the proceeding;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than *de minimus* interest that could be substantially affected by the proceeding; or

> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Illinois Supreme Court Rule 63.

Thus, Rule 63 governs disqualification where the judge is actually partial or personally biased in some significant way. Petitioners' motion did not present an argument of such actual partiality or bias. The motion did not recite facts falling within any of the categories listed in subsections (a) through (e). Instead, the motion argued the "appearance of impartiality. . . ." (App. 8a).

In their petition in this court, petitioners argue that recusal is warranted where there is "proof that a judge is actually biased or where an objective inquiry establishes the probability of bias on the judge's part." (Petition, p.22). They also contend that recusal is required where "the appearance of bias is serious enough to create a probability that the judge is actually biased. . . ." (Petition, p.23). Thus, petitioners essentially concede that something more than a mere appearance of impartiality is required to trigger recusal. Plaintiffs' motion relied on a mere appearance of impartiality. Accordingly, the motion was properly denied because it failed on its merits.

The present case is quite different from the facts in *Caperton, infra.* The contributions at issue here took place many years before the case was presented to the Illinois Supreme Court. The contributions did not involve the multi-million dollar amounts at issue in

Caperton. Under any applicable standard, the non-extraordinary, past contributions at issue in this case did not require recusal and did not trigger due process concerns.

B. The Petition Fails to Illustrate a Conflict in the Law or a Reason to Adopt Petitioners' Proposed New Rule of Law

The petition fails to illustrate a conflict in the law.

While petitioners cite cases that stand for basic propositions that due process requires a neutral and detached judge, they cite no case that actually conflicts with the ruling at issue here. This Court has held, to the contrary, that "most matters relating to judicial qualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (citing *Tumey*, *infra*). "[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). This Court has recognized that the due process "floor" is for "a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (citations omitted). The due process standard thus generally requires actual bias or an actual vested interest.

Here, petitioners do not contend that there is any actual bias or any interest in the outcome. They are left to argue only that there is a presumptive bias based upon the campaign contributions.

This Court has recognized "presumptive bias" as a basis to require recusal under the Due Process Clause only in three situations: "(1) when the judge 'has a direct personal, substantial, and pecuniary interest in the outcome of the case,' (2) when he 'has been the target of personal abuse or criticism from the party before him,' and (3) when he 'has the dual role of investigating and adjudicating disputes and complaints.'" *Richardson v. Quarterman*, 537 F.3d 466, 475 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1355 (2009) (citations omitted). *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927) (mayor-judge, who imposed fine based upon convictions, derived compensation from the fine); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (judge was a plaintiff in bad faith suit against the insurance industry and ruling could impact on his private case); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (judge was verbally attacked by defendant and then presided over defendant's contempt trial). Our case falls within none of those categories where any appearance of impropriety (if there were any) would trigger a due process concern. An appearance of impropriety, as opposed to some actual bias, has never given rise to this Court finding a due process violation. *See Del Vecchio v. Ill. Dep't of Corrections*, 31 F.3d 1363, 1372, n.2 (7th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1037 (1995) (historical analysis "support[s] the position that the Supreme Court has never rested due process on appearance.").

Moreover, this Court has recognized that a Justice on this Court should not necessarily resolve doubts in favor of recusal because, by removing a Justice (if it results in an even number of justices deciding the matter), the Court faces the possibility of tie votes and

therefore an inability to resolve a significant legal issue. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 915 (2004). The same reasoning applies to motions seeking recusal of State Supreme Court justices.

This order does not conflict with the controlling case law. To the contrary, the case law supports the order on review. This Court recognized in *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002), that "the Due Process Clause of the Fourteenth Amendment [ ] has coexisted with the election of judges ever since it was adopted." (internal citation omitted). *See also Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 310-11 (E.D. Pa. 1998) ("The receipt of campaign contributions does not present the type of 'extreme' case of bias required to implicate the federal constitution."). *Nigro* cited cases from the high courts of North Dakota, Alabama, Ohio, Florida and Texas holding that a "judge is not ethically, let alone constitutionally, required to recuse where a party is represented by an attorney who has contributed to or raised money for the judge's election campaign." *Id.*

This Court has also recognized that certain "biasing influence[s]" can be "too remote and insubstantial to violate the constitutional constraints." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986) (citations omitted). In *Aetna*, this Court rejected the suggestion that other justices on the Alabama Supreme Court should have been recused because they were also potential class members of the class action at issue. The Court acknowledged that such justices might have had a "slight pecuniary interest" in the case but held that such

interest was "highly speculative and contingent" and therefore did not raise any constitutional concern. *Id.* at 825-26.

Indeed, even the most vocal opponents to the concept of judicial campaign funding recognize that not all contributions rise to the level of due process violations. *See, e.g., Reimer*, "Inside NACDL," 33-MAR Champion 7, *8 (2009) ("NACDL [the Nat'l Ass'n of Criminal Defense Lawyers] does not . . . assert that . . . judicial campaign contributions . . . necessarily violate the Due Process Clause. Nevertheless, the Court must recognize that there comes a point where massive campaign support so obviously suggests impartiality as to require judicial disqualification.").

The petition fails to demonstrate a reason to adopt petitioners' proposed new rule of law.

Beyond failing to prove a conflict, plaintiffs cite no case that supports adopting their proposed "new rule." (Petition, p.27). The "new rule" they propose is

> "that an appellate judge as a matter of constitutional law should disqualify himself in a proceeding in which there is shown an objective 'probability of actual bias' or where his partiality might reasonably be questioned, including, but not limited to, instances where he has a close personal or professional relationship or a direct, personal or financial

> connection to a party appearing before him or in the outcome of the appeal."

(*Id.*). None of their cited cases adopt such a "rule" or provide a compelling, constitutional basis to adopt such a rule.

C. This Case is Not the Right Vehicle to Consider These Issues Because No Constitutional Impropriety Has Been Shown

As shown above, this case involves donations to campaign committees ranging from $250 to, at most, $11,500. All but seven of the 30 donations at issue were in the $250 to $2,500 range. Virtually all of the donations were made many years before the suit at issue was even filed and nearly a decade before the case wound its way up to the Illinois Supreme Court.

Whatever concerns might have been voiced in *Caperton v. A.T. Massey Coal Co., Inc.*, U.S. No. 08-22, do not exist here. However, *Caperton* is useful here because the briefs filed in that case offer some guidance as to why the current case is not one that should give this Court pause under any standard to be applied. Particularly instructive is an *amicus curiae* brief filed in *Caperton* by the Conference of Chief Justices ("the Conference"). It asserted that the following seven criteria should be used in evaluating whether due process requires recusal for campaign spending in a particular case: (a) size of the expenditure, (b) nature of the support, (c) timing of the support, (d) effectiveness of the support, (e) nature of the supporter's prior political activities, (f) nature of supporter's pre-existing

relationship with the judge, and (g) relationship between the supporter and the litigant. *See* Brief, 2009 WL 45973 *26-29 (U.S.). Using these criteria as a guide, it is clear that the present case does not raise the types of concerns that the judges themselves have raised as potential due process considerations.

(a) size of the expenditure

The Conference noted that any concerns that challenging an elective judge because of campaign support might open the floodgates for thousands of disqualification challenges was "unfounded" because "due process review of a challenged failure to recuse would be limited to cases of extraordinary support." 2009 WL 45973 at *23. Here, the amounts at issue are not only not "extraordinary," they are at best "ordinary" and are relatively insignificant. Certainly, they are not such extraordinary out-of-line contributions that it should raise the spectre of bias.

The contributions made to these justices totaled $1,500 to Burke, $16,000 to Thomas, $5,000 to Freeman, and $52,750 to Fitzgerald, comprising less than 1% to, 2.8%, to 3%, to at most, 5.9% (respectively) of the contributions made to these justices' campaign committees years ago. Given that plaintiffs claim that the defendant firm is "the most recognized and renowned plaintiffs' product liability law firm not only in Chicago and Illinois, but throughout the country," (Petition, p.12), these contributions cannot be characterized as extraordinary.

The amounts contributed by Joseph Power and Robert Clifford, defendants' legal experts in the underlying suit, should not be considered at all. This appeal involved the dismissal of certain counts of plaintiffs' complaint and summary judgment on other counts. No reference was made to either Power or Clifford in the Appellate Court's 42-page decision or in plaintiffs' 20-page Petition for Leave to Appeal. Their opinions were not the basis of either the trial court's rulings or the Appellate Court's affirmance. Those attorneys' relationships, whatever they are, with the Supreme Court justices is irrelevant in this case. On the face of the documents submitted to the Illinois Supreme Court to decide whether to grant leave to appeal, the court would not have known that either of these gentlemen were involved in this suit. Accordingly, their relationship to any of the judges and their campaign contributions should not even be considered. Also irrelevant and not worthy of consideration is the separate contributions that had been made to the campaign committee of a justice's spouse (Edward Burke).

(b) nature of the support

As to this factor, the Conference of Chief Justices explains that "the nature of the support, and its benefit to the candidate and his or her candidacy, must be considered." 2009 WL 45973 at *26. This factor also considers how the monies at issue are controlled and spent.

In Illinois, the Code of Judicial Conduct imposes guidelines that protect against impropriety. For example,

Illinois Supreme Court Rule 67 (B)(2) (which adopts the Model Code of Judicial Conduct Canon 4.1), specifically prohibits candidates for judicial election from personally soliciting or accepting campaign contributions. *See* Ill. Sup. Ct. R. 67(B)(2). There is no suggestion in this case that any contribution was made to or accepted by any of these justices that violated this Canon. The State of Illinois Judicial Ethics Commission has also recognized that the State's requirement that the identity of contributors (making contributions exceeding $150) be published, "places judges and their campaign contributors under public scrutiny, thus providing some assurance of judicial impartiality." Ill. Jud. Ethics Comm., Op. 93-11 (1993), 1993 WL 774478, *2.

As far as the "benefit" of the support, for Justice Burke, this was moot because her election was ultimately uncontested and much of the campaign contributions were returned. Justice Freeman's 2000 retention was uncontested (although he was required to win by a 60% "yes" vote). Justice Fitzgerald and Justice Thomas ran in contested elections.

(c) timing of the support

That defendants made some contributions to these four justices' campaigns is merely a historical fact. Emphasis should be on the word "historical." Most of the contributions took place in 1999 to 2000, nearly a decade before the November 2008 motion to recuse. Even if *past* contributions (as opposed to contemporaneous contributions) could have any potential to bias a judge to rule a certain way, based upon some debt of gratitude or other elusive theory, at

some point such "debt" must fade. A contribution made many, many years before the case at issue cannot be deemed to have any effect, or a sufficient effect, to constitute a due process concern.

(d) effectiveness of the support

The "support" given by the defendants was to the campaign committees for these justices.

(e) nature of the supporter's prior political activities

The Conference explains that

> "the supporter's record of campaign activity must be considered. If the supporter has habitually made large contributions to or made independent expenditures on behalf of many candidates in the past, the support for one jurist who may later happen to preside over a case in which the supporter was involved would raise less suspicion than if the support was novel or extraordinary."

2009 WL 45973 at *28.

Public information available on the ISBE website (which petitioners rely on as the exclusive source of their recusal facts), shows that Corboy & Demetrio and these partners routinely make contributions of comparable amounts to numerous different campaign committees. Thus, the fact that minor contributions were made to these four justices is neither novel, extraordinary, nor suspicious.

(f) nature of supporter's pre-existing relationship with the judge

The only "facts" provided in the motion to recuse (and they are unsubstantiated) regarding a past relationship between the defendants/supporters and these Justices is that Philip Corboy (who is a partner at the defendant firm but not an individually named defendant) "as special counsel to the Illinois Democratic Party, has for years hosted parties to which several members of the Illinois Supreme Court are frequent invitees." (App. 12a). The motion does not specify which of the "several members" of the court are invitees; how often is their "frequent" attendance; or how many years constitute the "for years" that Corboy has hosted such parties. To the extent that the motion provides any factual information, it shows nothing more than that Mr. Corboy, in a professional capacity, sometime in the past (presumably more than 15 years ago) hosted professional events that would have included numerous people, including at times one or more of the Justices of the Illinois Supreme Court. This does not establish any type of special relationship between Mr. Corboy and any Justice that should raise due process concerns.

(g) relationship between the supporter and the litigant

The only "supporter" who is a named party is Mr. Bingle. The other supporters are partners of the respondent law firm and are not individually named defendants in this suit. That, and the fact that this is a malpractice suit involving allegations against the defendants purely in their professional capacities, renders this factor benign.

Even if petitioners' unprecedented "rule" were recognized and even if violation of such a rule did rise to the level of a due process violation, this case would still not be an appropriate vehicle for consideration because the facts, as presented on this Record, fail to violate petitioners' homespun rule. They suggest that disqualification is required where

> "there is shown an objective 'probability of actual bias' or where [the judge's] partiality might reasonably be questioned, including, but not limited to, instances where he has a close personal or professional relationship or a direct, personal or financial connection to a party appearing before him or in the outcome of the appeal."

(Petition, p. 27). There has been no showing of a "probability of actual bias." Nor has there been a showing of any type of "close" relationship. To the extent that minor, past contributions to a justice's campaign committee could constitute a financial "connection" at all, it certainly is not "direct." Thus, even under petitioners' standard, this case fails to raise constitutional concerns.

Moreover, although petitioners assert that this petition raises "fundamental issues of due process" (Petition, p.21), they rely on nothing more than the same argument they advance as to why these justices should have recused themselves. The motion to recuse was properly denied. Regardless, petitioners' claim of error is not sufficient to establish that a failure to recuse rises to the level of a due process violation.

See, e.g., Richardson v. Quarterman, 537 F.3d 466, 474, n.4 (5th Cir. 2008) ("[g]enerally, the constitutional due process requirements regarding judicial impartiality are much narrower than the requirements found in recusal statutes and ethical canons."). "Thus, a violation of a state or federal statute for the failure to recuse a trial judge because certain circumstances may give rise to an appearance of bias on the part of the judge does not necessarily constitute a due process violation." *Id.* *See also U.S. v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003), *cert. denied*, 540 U.S. 1209 (2004) (because claim failed to "pass muster" under 28 U.S.C. § 455(a), which requires recusal when a judge's impartiality might reasonably be questioned, "it cannot survive the more rigorous standards required of a claim under the due process clause.").

D. This Court Should Not Grant Certiorari To Consider a Moot and Hypothetical Argument

Half of petitioners' argument is hypothetical, further warranting that this Court decline review. In section C, petitioners argue: "**If** petitioners' motion for recusal of the four Justices . . . **had been** successful, the court **would have** lacked a quorum . . . to conduct any further review . . . and because a clear majority of four votes out of seven is necessary to grant petitioners' Petition for Leave to appeal, **it would have** lacked the power to grant the petitioners' Petition for Leave to Appeal. . . ." (Petition, p. 29, emphasis added). But the point is that the motion to recuse was denied. Accordingly, the Illinois Supreme Court "dismiss[ed] as moot" that portion of petitioners' motion. There is no basis for this Court to consider, on certiorari review, the moot and dismissed portion of the motion.

Moreover, the petition indicates that on February 3, 2009, the Illinois State Senate's Executive Committee recommended to the Executive Subcommittee on Constitutional Amendments an amendment to Article VI, § 3 of the Illinois Constitution which would allow for temporary appointments to the Illinois Supreme Court when a sitting justice is recused. (Petition, p.16). Accordingly, the State is working through its own procedures to address this issue. It is premature and unnecessary for this Court to expend its limited resources in resolving how to address the issue of replacement judges in a case where there were no judges to replace and where the State is considering a change to its Constitution to deal with this issue.

E. There Is No Need For Exercise of this Court's Discretionary Review

The petition should be denied because it utterly fails to provide this Court with any compelling reason for it to exercise its discretionary and limited review powers to consider this case. There is no conflict between any case law identified. To the contrary, petitioners claim that "the Court made clear" the standards in the existing case law. (Petition, p.24). Petitioners cite *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) and simply discus how the law in that case should be applied to the purported facts of our case.

This Court has already considered the *Caperton* case. To the extent that this area of the law needs discussion, the Court already has the vehicle to make those pronouncements. Petitioners should not be allowed to use this Court's current interest in this area of the law as a platform to raise reconsideration of a motion that was properly denied. Because the order

from which petitioners seek review was both procedurally and substantively deficient on its face, the petitioners' cause lacks merits. This Court's resources should not be squandered on this case.

CONCLUSION

Wherefore, based upon the arguments and reasons above, the Writ which Petitioners seek should be summarily denied.

Respectfully submitted,

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